(1)

No. 91-931

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

EDWARD R. STEPHENS, DAVID WAYNE HOLLAND, DANIEL B. CARVER, SR., and MARION FRANKLIN SHIRLEY, JR.

Petitioners,

Respondents.

versus

JAMES E. McKINNEY, ET AL.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

David W. Holland, Pro Se

Marion Franklin Shirley, Jr., Pro Se

Daniel B. Carver, Sr., Pro Se

Edward R. Stephens, Pro Se

(Addresses on the Conclusion)

QUESTIONS PRESENTED

In **Giuglio v. United States,** 405 U.S. 150 (1972) this Court said "as long ago a **Mooney v. Holohan,** 294 U.S. 103 (1935) this Court made clear that deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice'. This was reaffirmed in **Pyle v. Kansas,** 317 U.S. 213 (1942). The Eleventh Circuit has adopted this theory as late as April 17, 1991 in **DeMarco v. United States,** 928 F. 2d 1074, however, as will be shown below, the Eleventh Circuit failed to apply this theory in the Petitioners case.

1. Should the Respondents be allowed to recover money damages from the Petitioners after Respondents attorney, Morris Dees presented evidence, which he either knew or should have known to be false and perjurious. Also, Mr. Dees argued to the jury these issues, which he knew, or should have known were either false or misleading.

2. The Eleventh Circuit Court of Appeals erred in refusing to recuse themselves from hearing this appeal after the tragic death of their friend and colleague, who at the time of his death was an active judge on this Circuit. Immediately after the death of Judge Vance, the national news media, specifically the Atlanta Journal, the largest circulated paper in the southeast, insinuated that the death was caused by members of white racist organizations, specifically the Ku Klux Klan. At least two (2) of these Petitioners were questioned by the Federal Bureau of Investigation concerning the death of Judge Vance. Further, in the

case of **McMullen v. Carson,** 754 F. 2d 926 (11th Circuit 1958) the eleventh circuit clearly shows their bias against members of the Ku Klux Klan by stating that: "The *Ku Klux Klan is a criminal organization. All of these Petitioners are either active members or former members of various Ku Klux Klan groups.*"

3. The Eleventh Circuit Court of Appeals, when deciding cases on which they do not like the parties **"substituted its own findings for those of the district court."** This court stated this concerning the Eleventh Circuit in **Amadeo v. Zant,** 108 S. ct. 1771, 1777-79 (1988). The Eleventh Circuit in their opinion on October 27, 1989, concerning these Petitioners stated: **"Through the four persons who are appellants here apparently did not throw rocks or bottles, in the direction of the marchers. . ."** Nowhere in the record is it even alleged that the Petitioners in this action threw anything in any direction.

LIST OF PARTIES

Edward R. Stephens

David W. Holland

Daniel B. Carver, Sr.

Marion Franklin Shirley, Jr.

James E. McKinney and all other persons who participated in a Brotherhood March in Forsyth County, Cumming, Georgia on January 17, 1987.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

EDWARD R. STEPHENS, DAVID WAYNE HOLLAND, DANIEL B. CARVER, SR., and MARION FRANKLIN SHIRLEY, JR.

Petitioners,

Respondents.

versus

JAMES E. McKINNEY, ET AL.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, respectfully prays that a Writ of Certiorari issue to review the decision for the United States Court of Appeals for the Eleventh Circuit, entered in the above styled proceeding on May 6, 1991. The Court of Appeals for the Eleventh Circuit denied

a timely filed motion for rehearing in banc on June 19, 1991.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals was not an officially published opinion, but the opinion is reprinted in the appendix.

The order of the Eleventh Circuit Court of Appeals denying the Petitioners rehearing and suggestion of rehearing in banc is reprinted in the appendix.

JURISDICTION

The jurisdiction of this Court to review the decision of the Eleventh Circuit is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The statement of the case is immaterial to the issue presented in this Writ, however, for a complete statement of this case, same can be found in **Edward R. Stephens, et al v. James E. McKinney, et al.,** Supreme Court Docket number 89-1558, certdenied, 58 U.S. L.W. 3750, U.S. May 29, 1990.

The issues presented to this Court for review at this point can be found on page i.

I. Reasons For Granting The Writ

Petitioners attorney, Morris S. Dees suborned and encouraged his witnesses to commit perjury in the trial of this case and capitalized on this perjury in his closing argument to the jury.

Respondents attorney, Morris Dees is a nationally known civil rights attorney. Mr. Dees in presenting his case called 25 witnesses to testify. Two of these witnesses, (his most important witnesses,) have come forth and admitted under Oath, to having committed perjury against these petitioners, at the encouragement of Mr. Dees. See Mr. William Mark Mize's affidavit which is in the appendix marked as exhibit "A". See also the sworn deposition of Mathew Bruce Ray, which is attached to Petitioners Brief which was filed in the Eleventh Circuit Court of Appeals.

Specifically, page 13 of Mr. Ray's deposition, Mr. Ray admits to committing perjury. Mr. Ray, by trade is a printer who has printed literature for the Ku Klux Klan for some years. Vol. 5, page 601. Mr. Ray, on page 14 of this deposition stated one of the reasons that he committed perjury was because of the pressure that was exerted on him by the investigator who is employed by the Southern Poverty Law Center. (Mr. Dees is the Executive Director of this operation.)

On page 14 of Mr. Ray's deposition, questioning by Petitioner Holland went as follows:

Q: Do you think one of the reasons, do you think and feel one of the reasons that you testified falsely at the trial was because of the pressure that was put on you and your family by the investigators of the Southern Poverty Law Center ?

A: Yes, Sir.

Mr., Ray's testimony at the trial of this case destroyed the testimony of Petitioner Holland and Michael Eddington, Vol. 5, page 602. Mr. Eddington testified via a video taped deposition. A transcript of Mr. Eddington's testimony is attached to Respondents "Supplement The Record On Appeal." Mr. Eddington testified that he, Eddington, had Dacula Rapid Press, the company in which Mr. Bruce Ray is part owner, print some particular Ku Klux Klan stickers, Page 72 of Mr. Eddington's testimony. Mr. Ray denied, at the encouragement of Morris Dees, that he printed the stickers. Vol. 5, page 602.

Petitioner Holland testified that Dacula Rapid Press and Bruce Ray has in fact printed the Ku Klux Klan stickers, Vol. 5, page 558, 559. Again, Mr. Ray, at the encouragement of Morris Dees and his entourage, denied this. Vol. 5, page 605.

Later in Mr. Ray's deposition, he blatantly admits that he committed perjury in this case when he denied printing the sticker. See Ray's deposition at 7. The testimony of Mr. Ray, who was not a party to this action, obviously convinced the jury that Petitioner Holland and Mr. Eddington were testifying falsely when Mr. Ray denied printing the sticker.

Mr. Dees, in his summation to the jury, capitalizing on this perjured testimony stated: *"And Mr. Ray that got on the stand, a business man in the community. . . the man got on the stand and told you he didn't print the decal, what else can he say?"* Vol. 12, page 1558. This fraud and perjury that Mr. Dees perpetrated upon the district court and the jury has defiled the court and slaps the face of justice. Such egregious conduct should not be tolerated in a just society.

Mr. Mize, another witness called to testify by Mr. Dees testified extensively how he was coerced into committing perjury in depositions and affidavits at the encouragement of Morris Dees and his investigator, Joe Roy. See Mize affidavit, exhibit "A", in which Mr. Mize gave these Petitioners in an attempt to have this judgement reversed in the Eleventh Circuit Court of Appeals.

Messrs. Mize and Ray have made it perfectly clear that they intentionally attempted to defraud the court, at the encouragement of Morris Dees. This Court in Minneapolis, St. Paul & S.S. Marine Ry. Co. v. Moguin, 283 U.S. 520, 521,22 stated:

> A litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

The Eleventh Circuit Court of Appeals has adopted this theory of law, but this Circuit failed to apply it, in this particular case.

In a case strikingly similar to this case, the Eleventh Circuit Court of Appeals reversed a conviction when it was revealed that the government used perjured testimony and also when the prosecutor capitalized on this perjury in her closing argument. The Eleventh Circuit said, "As long ago as Mooney v. Holohan, 294 U.S. 103 (1935) this court made clear that the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264 (1959), we said 'the same result obtains the state, although not soliciting false evidence, allows it to go uncorrected when it appears. Id at 269." DeMarco v. United States, 928 F. 2d 1074 (1991).

Also, the district court erred in refusing to grant these Petitioners a new trial because of the perjured testimony.

> A new trial should be granted when (a) the court is reasonably well satisfied that the testimony given by a material witness is false; (b) that without it the jury might have reached a different conclusion; (c) that the party seeking the new trial was surprised when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.
>
> Martin v. United States, 17 F. 2d 973, 976 (5th Circuit 1927) cer denied 115 U.S. 527 (1927).

If it is found that there was fraud on the court, the judgement should be vacated, and the guilty party denied all relief. Hazel Glass Co. v. Hartford Empire Co., 322 U.S. 238, 250-51 (1944). The testimony of Messrs. Mize and Ray undercut the testimony of the Petitioner Holland and Eddington, and the Respondents agree to this. See Respondents brief that was filed in the Eleventh Circuit at 7.

These Petitioners are entitled to relief since the evidence is such that it is likely to produce a new outcome if this case was retried, or is such that would require the judgment to be amended. Scutierio v. Paige, 808 F. 2d 785, 793 (11th Circuit 1987); Hunnicutt v. Bd. of Regents of University Sys. of Ga., 122 F.R.D. 605, 07 (M.D. Ga. 1988) 11 C. Wright & Miller, Fed. P. & Proc. section 2859 (1973).

II. The Eleventh Circuit Court of Appeals Erred In Refusing To Recuse Themselves Because Of Their Bias And Impartiality Towards These Petitioners.

The Eleventh Circuit Court of Appeals erred in refusing to recuse themselves from this case. In requesting that the judges on this circuit recuse themselves, the Petitioners alleged that because white supremacists, particularly, the Ku Klux Klan groups in the state of Georgia were suspected by the Federal Bureau of Investigation of being the responsible parties for the tragic death of their colleague, Robert S. Vance, who was an active judge on this circuit. Judge Vance was violently murdered when he opened a package that was in fact a mail bomb. The Ku Klux Klan was, at first, the primary target of this investigation. The largest newspaper in the southeast, the Atlanta Journal carried numerous stories stating that via reliable sources, the United States Department of Justice was investigating the Ku Klux Klan and their members. Two (2) of these Petitioners were questioned by the FBI.

In requesting that the Eleventh Circuit Court of Appeals recuse themselves, these Petitioners relied upon 28 U.S.C. 455 (a) which says:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

The purpose of 28 U.S. C. 455 (a) is to promote public confidence in the integrity of the judicial process. No reasonable person would think that after the organization in which all of these Petitioners are either active or former members of, was suspected of murdering their friend and colleague Robert S. Vance, that they would receive a fair and impartial hearing.

This court in Liljeberg v. Health Services Corp., 108 S. Ct. 2194, 2202-03 (1988) in adopting the language of Judge Clark of the Fifth Circuit (now the Eleventh Circuit) stated:

> The goal of section 28 U.S.C. 455 (a) is to avoid even the appearance of partiality. If it would to a reasonable person that a judge has knowledge of litigation then the appearance of impartiality is created even through no actual partiality exists because the judge actually has no interest in the case because the judge is pure in heart and incorruptible. . . under section 455 (a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person knowing all the circumstances, that would expect that the judge would have actual knowledge.
>
> Liljeberg supra at 872, 873.

This circuit, specifically Judge Thomas Clark, who has been on each and every panel that has denied these Petitioners any relief was one of the judges that authored an outrageous decision in the case of McMullen v. Carson, 754 F. 2d 936 (11th Circuit 1985), this biased decision labeled all Ku Klux Klan groups as criminals. Clearly, judge Clark does not practice what he preaches.

> Two critical factors surface in this case: The first two involves what this record shows as to the nature, both actual and perceived, of the Klan as a violent criminal and racist organization. . .

With the above in mind, Judge Clark has already formed an opinion that these Petitioners are criminals. Judge Clark specifically refused to recuse himself. See exhibit " B ".

In another case that involved the Ku Klux Klan, United States v. White, 846 F. 2d 678 (11th Circuit 1983), the district court judge presiding over that case was removed by the Eleventh Circuit Court of Appeals after he made several rulings in favor of the Klanspeople involved. The Eleventh Circuit stated that Judge Acker had become "*hardened*" against the government, at 696. Judge William Acker, in a lengthy opinion on being removed from the White case, In Possible Recusal Of William Acker, Jr., 696 F. Supp. 591 (N.D. Ala. 1988), Judge Acker stated at 596 that the reason for his removal from the Klan case was because this judge was biased against the government because of his favorable rulings for the ku Klux Klan.

III. The Eleventh Circuit Court of Appeals Substituted Their Own Findings For Those Of The District Court.

Judge Acker quoting from this court's case of Amadeo v. Zant, 108 S. Ct. 1771-79 hit the nail on the head when he, and this Court described the Eleventh Circuit's attitude when they decide a case in which they are biased against the defendants.

> Without examining the record or discussing its obligations under Rule 52 (a), the court (referring to the Eleventh Circuit Court of Appeals) simply expressed disagreement and substituted its own findings for those of the District Court.

The Eleventh Circuit Court of Appeals made its own finding in this case and disregarded the record completely when it stated in its opinion "*Though the four persons who are appellants here apparently did not throw rocks or bottles in the direction of the marchers.* . . ." No where in the record, or any brief filed is it even alleged that these Petitioners threw anything in any direction - - this is outrageous.

In the trial of Walter Leroy Moody, the individual who was subsequently indicted and convicted of murdering Judge Vance, the special prosecutor of this horrible and cowardly crime - Mr. Freech stated:

> Mr. Moody is a racist. He wouldn't go to a Klan rally; he's not an ideological racist; its just that he cared nothing for Mr. Robinson or black people and he knew the FBI would run straight for the KKK and all the White Supremacists. And that's what they (FBI) did at first.
>
> See exhibit "C" which is an article that appeared in the Atlanta Journal/Constitution, June 27, 1991.

The Eleventh Circuit could not have given these Petitioners a fair and impartial hearing on their appeal in this case and for this reason alone, this Court should grant this writ, and remand this case back for further proceedings before a different panel of judges from another Circuit or back to the District Court, and again, to a different judge.

CONCLUSION

For all of the foregoing reasons set forth above, this Court should grant this petition for writ of certiorari, and review the decision of the Court of Appeals for the Eleventh Circuit, simply because of the circumstances surrounding this particular case and other cases involving the Ku Klux Klan in this Circuit and the Eleventh Circuit's decision concerning these groups, and the Respondents complaint be dismissed, or in the alternative, remand this case back to another district court so that these Petitioners can receive a fair and impartial trial.

Pro Se pleadings are to be "*liberally construed*" and "*must be held to less stringent standards than formal pleadings drafted by lawyers.*" Estelle v Gamble, 429 U.S. 97 (1976)

This the _____ day of September, 1991.

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Appendix

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8512
Non-Argument Calendar

D. C. Docket No. 1:87-cv-565-CAM

JAMES E. McKINNEY, et al.,
Plaintiffs-Appellees,

versus

SOUTHERN WHITE KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, et al.,
Defendants,

DANIEL CARVER, DAVID HOLLAND, FRANK SHIRLEY, EDWARD STEPHENS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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(May 6, 1991)

Before CLARK, COX and DUBINA, Circuit Judges.

PER CURIAM:

The appellants in this case appeal from the district court's denial of their motion to vacate judgement filed pursuant to Fed. R. Civ. P. 60(b). On appeal, our review is limited to whether the district court abused its discretion in denying the Rule 60(b) motion. Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984). Since our review of this case persuades us that the district court did not abuse its discretion when it denied the appellants' Rule 60 (b) motion, we affirm the order of the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8512

HOSEA WILLIAMS, ETC., Plaintiff

JAMES E. MCKINNEY,
individually and on behalf of all black citizens of the state of Georgia, Plaintiff-Appellee,

versus

SOUTHERN WHITE KNIGHTS, KNIGHTS OF THE KU KLUX KLAN., ETC., ET AL,

Defendants,

DAVID HOLLAND,
individually and as Grand Dragon of the Southern White Knights, Knights of the Ku Klux Klan, Inc.,
DANIEL CARVER,
as Grand Dragon of the Invisible Empire, Knights of the Ku Klux Klan, Inc.,
EDWARD SHIRLEY and
MARION FRANKLIN SHIRLEY,

Defendants-Appellants.

On Appeal from the United States District Court for The Northern District of Georgia

O R D E R :

Appellant's motion that the undersigned recuse himself from participating in this appeal en banc is DENIED.

UNITED STATES CIRCUIT JUDGE

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8512

JAMES E. MCKINNEY, et al., - Plaintiffs-Appellees,

versus

SOUTHERN WHITE KNIGHTS, KNIGHTS OF THE KU KLUX KLAN, et al.,

DANIEL CARVER, DAVID HOLLAND, - Defendants
FRANK SHIRLEY, EDWARD STEPHENS.
Defendants-Appellants

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 6 ,11the Cir., 1991 - F.2d)

Before: CLARK, COX and DUBINA, Circuit Judges

PER CURIAM:

(✓) The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), The Suggestions(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)